

No only would this approach treat *U.S. applicants more favorably than foreign applicants*, it would treat *U.S. licensees less favorably than foreign licensees*. This is perhaps the most perverse consequence of treating applicants and licensees on equal footing: An FCC space station license would be accorded *less* respect by the FCC than a *French* space station license would. If, for example, a French station were notified to the ITU and recorded in the Master International Frequency Register, the international obligations of the United States would prevent the Commission from authorizing any new station that would cause harmful interference to the French system.³⁹ If the Commission requires major operational concessions from *domestic* licensees to accommodate later applicants, it necessarily decides to treat its own licensees less favorably than those of France. Such an approach would devalue all U.S. satellite licenses and undermine the interests of the United States.

Common sense accords with domestic and international law on this point. If possessing an authorization from the Commission did not give licensees priority over applicants in resolving incompatibilities, a host of practical difficulties would ensue. Most obviously, the design process would never stop. For a service such as NGSO FSS, each new applicant would have the right to ask all previous proponents, whether licensed or not, to redesign their systems. Any applicant that actually received a license would find it practically impossible to raise the

³⁹ “Any new assignment or any change of frequency or other basic characteristic of an existing assignment . . . shall be made in such a way as to avoid causing harmful interference to services rendered by stations using frequencies assigned in accordance with the Table of Frequency Allocation in this Chapter and the other provisions of these Regulations, the characteristics of which assignments are recorded in the Master International Frequency Register.” ITU Radio Regulations, Art. 6, § 3.

necessary capital to construct and launch a system. In the wildly unlikely event that an NGSO FSS system were ever placed in operation under these circumstances, potential customers could have no assurance that the system would always retain the same capacity, characteristics, and quality as when they purchased their user terminals.

Fortunately, the Commission's licensing processes have never been characterized by such arbitrariness. Indeed, in one recent case, the Commission took pains to emphasize that its licenses can be relied upon despite the pendency of other proceedings. In *Norris Satellite Communications*, the licensee argued that its failure to live up to its commitments was the Commission's fault because the pendency of a Commission rulemaking made it impossible to obtain financing. The Commission rejected this argument, holding that Norris's license gave it "clear and unambiguous authority."⁴⁰ Regulatory uncertainty was not a major impediment to Norris's acquisition of capital because Norris had everything the Commission could give it—it had a license.

Teledesic has relied on its license in all the ways that Norris never did. It has selected its prime contractor and is even now on the verge of announcing its global team of strategic partners. This has been possible only because of the widespread belief that an FCC license confers "clear and unambiguous authority," just as the Commission stated in *Norris*. The Commission must ensure that its decision in *Norris* is based on a reality that will continue into

⁴⁰ *Norris Satellite Communications, Inc.*, FCC 97-377, at ¶ 17 (rel. October 10, 1997).

the future and be applied in the Ka band. To deviate from that consistent approach would undermine the development of the whole satellite industry, especially in capital-intensive services such as NGSO FSS.

CONCLUSION

The *Third Report and Order* should be clarified. First, the Commission must announce that it has not adopted binding sharing rules or in any way endorsed any specific strategy for NGSO systems to share the spectrum. In particular, the Commission does not yet have evidence to endorse the feasibility of sharing using non-coordinated orbits. Second, the Commission should clarify that it will not further divide the NGSO FSS Priority Bands simply because one or more second-round applicants may choose an unworkable sharing strategy.. Finally, the Commission should also clarify that the responsibility for avoiding harmful interference, though shared by all, falls first and foremost on new applicants, and that no licensee, whether foreign or domestic, will be required to “significantly alter” its licensed operations in order to accommodate

a later applicant, whether foreign or domestic. For all the foregoing reasons, the Commission's *Third Report and Order* should be clarified, or in the alternative, reconsidered.

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